

The Board has considered the record and adopted the stipulations listed in the Award. At argument before the Board, the parties stipulated that, as part of this Order, claimant's entitlement to both review and modification and future medical treatment upon application to the director remain open. Claimant acknowledged the deposition of Dr. Mark Melhorn is properly in the record and may be considered as evidence in this matter. There is no ongoing dispute regarding claimant's entitlement to \$500.00 in unauthorized medical allowance as awarded by the ALJ, and the parties do not dispute the award of medical mileage in the amount of \$589.56. Respondent also does not dispute the amount of penalties awarded by the ALJ, should the Board find penalties appropriate.

ISSUES

The ALJ found and concluded claimant suffered a 25 percent impairment of function to the left upper extremity, at the level of the hand. He also found claimant entitled to reimbursement of his medical mileage in the amount of \$589.56; to unauthorized medical expenses not to exceed \$500.00; to statutory penalties pursuant to K.S.A. 44-512b in the amount of \$211.79, as of October 9, 2013, with additional penalties accruing at the rate of \$.98 per day until the Award and accrued penalties are paid in full; and to future medical treatment, upon application to the Director.

The claimant requests review of the Award, arguing he is entitled, based on the opinion of Dr. Fluter, to a 34 percent permanent partial functional impairment to the forearm because his disability is to the left finger, thumb, hand and wrist. In the alternative, he argues the Board should give equal weight to the opinions of Dr. Fluter and Dr. Loewen, and assign a 27 percent permanent partial functional impairment to the forearm. Claimant requests that penalties be paid based on what the Board determines the impairment rating should be and based on respondent's failure to pay the unauthorized medical and medical mileage.

Respondent contends the Award should be affirmed.

The issues on appeal are:

1. What is the nature and extent of claimant's functional impairment?
2. Is claimant entitled to payment of permanent partial disability benefits based upon a scheduled injury to the forearm instead of the hand?
3. Is claimant entitled to payment of K.S.A. 44-512b penalties on the past due medical mileage and unauthorized medical allowance?

FINDINGS OF FACT

Claimant began working for respondent at the end of January 2011 as a line operator. His job was to check the machine that makes plastic to make sure it operates properly and he had to cut and stack parts. On February 1, 2011, claimant's second day on the job, he suffered a serious injury to his left hand. He testified he was cutting a piece of plastic with a miter saw when the trigger began to stick on the blade and malfunctioned, grabbing his left hand. As a result, claimant's ring finger was almost completely cut off, his pinky finger was pinched and scraped, his middle finger was shattered with a piece missing, and his index finger was cut almost to the tendon.

Claimant testified one man in the next line over noticed that he was injured and found a supervisor. Claimant's hand was wrapped and he was taken to the hospital in McPherson. He was transferred to Hutchinson Hospital when it was concluded McPherson didn't have the capabilities to care for his injury. Claimant had surgery under Dr. Kirtie Lo to repair his hand and fingers. Dr. Lo used three pins to repair the fingers and claimant's hand was multi-colored with bruising all the way into his wrist.

Claimant had a second surgery on March 23, 2011, to remove the pins. Claimant was assigned to orthopedic surgeon Dr. Jonathan Loewen after Dr. Lo left the employment of the hospital. Dr. Loewen ultimately told claimant he had to live with what he had. Claimant also received physical therapy and occupational therapy.

At the regular hearing, claimant complained of limited flexion of his pinky finger, loss of function of his ring finger, and constant numbness and stabbing pain mostly in the ring finger. Claimant testified that he is unable to bend his middle finger to his palm and has severe pain when the finger is bent wrong. He has the constant feeling that something is not right. It is claimant's understanding that, at some point, he is going to need to have the knuckle on his middle finger replaced.

Claimant testified that he can hardly grip with his left hand anymore. He also has lost coordination in his left hand and fingers, and has lost some function in his thumb. He also has issues in cold temperatures and anytime he works in temperatures below 60 degrees he has to wear a glove. He also complains of shooting pain and tightness in his wrist area. Claimant testified to no problems with his right hand.

Claimant has no control over his ring finger and, when washing his hands or face, the finger points in all different directions. Respondent returned claimant to work and was to provide him with light duty. However, claimant was given a full duty job and was expected to keep up. When he was unable to keep the pace with the rest of the workers, claimant was laid off.

At the request of his attorney, claimant met with board certified orthopedic surgeon J. Mark Melhorn, M.D., on August 7, 2012, for an examination. Dr. Melhorn noted claimant complained of discomfort and tenderness in his left ring and middle finger. Claimant also had limited range of motion in his fingers and decreased strength in his left hand and difficulty gripping. Claimant reported being unable to perform all of his regular work duties for his employer at that time, Cooperative Grain & Supply.

Claimant contends Dr. Melhorn did not evaluate his wrist. However, Dr. Melhorn's report of August 7, 2012, discusses the physical examination of claimant, including the wrists. There is no indication of wrist problems.¹ Range of motion measurements were

¹ Melhorn Depo., Ex. 2 at 4.

obtained, but claimant's impairment was limited to the level of the hand. The report fails to indicate any complaints or limits to claimant's wrist.

Dr. Melhorn opined claimant's impairment was limited to the hand. He diagnosed a left hand and middle finger miter saw injury post repair and pin removal. He opined claimant was a good candidate for additional surgery if needed, but opined, at this point, claimant is able to function. Dr. Melhorn assigned claimant a 21 percent impairment of function to the left hand.

The April 2, 2012, medical report of Jonathan J. Loewen, M.D., was stipulated into evidence by the parties on September 30, 2013. Claimant was diagnosed with almost complete obliteration of the left long finger MCP joint with a fracture to the ring finger. Claimant's hand strength was limited with decreased sensation in both the ring finger and long finger. However, both active and passive range of motion of the left wrist were reported as normal.

In assessing claimant's functional impairment, Dr. Loewen utilized the FCE report of March 8, 2012, which he noted was consistent with his findings of claimant on examination. Claimant was assessed a 20 percent functional impairment to the left upper extremity. However, Dr. Loewen's examination uncovered no limitations above claimant's left hand.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation specialist, George G. Flutter, M.D., on October 25, 2012, for an examination. Claimant had complaints of pain in his left hand and fingers. Claimant described the pain as aching, shooting and sometimes sharp. He was also experiencing numbness in his left middle and left ring fingers, and complained of severe pain in cold temperatures and of difficulty lifting and gripping. Claimant indicated that heat made the pain better. He denied any prior problems with his right hand. At the time of the evaluation, claimant was working for Cooperative Grain & Supply with no restrictions.

Dr. Flutter examined claimant and provided his assessment of claimant as status post work-related injury on or about February 2, 2011; left hand injury; status post left hand surgery on February 1, 2011; status post fixation pin removal on March 23, 2011; and probable neuropathic pain affecting the left hand. Dr. Flutter opined that, based on the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the reported work-related injury occurring on or about February 2, 2011, and its sequelae. He went on to opine that the prevailing factor for the injury and the need for medication evaluation/treatment is the injury occurring on February 2, 2011.

Dr. Flutter assigned claimant a 35 percent impairment to the left hand, and an additional 3 percent for the left wrist for range of motion deficits, for a total left upper extremity impairment of 34 percent. He also assigned restrictions of lifting from waist to

floor 50 pounds rarely, 30 pounds occasionally, and 15 pounds frequently; lift from waist to crown 20 pounds rarely, 15 pounds occasionally and 10 pounds frequently; front carry 75 pounds rarely, 60 pounds occasionally, and 10 pounds frequently; right carry 76 pounds rarely, 56 pounds occasionally, and 31 pounds frequently; left carry 61 pounds rarely, 41 pounds occasionally and 21 pounds frequently; restrict elevated work, standing work, crouching, kneeling/half kneeling, sitting and stair climbing to an occasional basis; and in addition thermal protection for the hands should be provided when working in cold environments.

On cross-examination, Dr. Fluter acknowledged Dr. Loewen's February 6, 2012, report limits claimant's pain to the hand, with no radiation of the pain into the arm. Dr. Loewen's examination includes range of motion testing of the wrist which was found to be normal, with no pain in the wrist. Additionally, the Functional Capacity Test also indicated range of motion testing of the wrists (plural) was WNL (within normal limits).

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(g) states:

(g) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 44-510e(a) Furse 2000 states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Claimant argues entitlement to an impairment to the forearm due to resulting disability into his left wrist. As was noted by the ALJ, the medical report of Dr. Loewen

contains no information indicating impairment to claimant above the hand, even though his rating involves a 20 percent impairment to the left upper extremity. Dr. Melhorn found a normal examination of the left wrist with no range of motion deficits in the wrist. Even Dr. Fluter, claimant's expert who rated claimant at 3 percent to the left wrist due to range of motion limitations, acknowledged the FCE performed on claimant displayed a normal range of motion in the left wrist.

The Board finds the more persuasive weight of the evidence supports a finding that claimant suffered permanent impairment to the hand, and not the wrist. The ALJ found claimant suffered a 25 percent impairment of function to the left upper extremity at the level of the hand. The Board adopts this finding as its own.

K.S.A. 44-512b(a) Furse 2000 states:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

Claimant alleges the ALJ erred in not allowing penalties for the unauthorized medical allowance and medical mileage awarded in this matter. K.S.A. 44-512b Furse 2000 allows interest "on the amount of **"disability compensation found to be due and unpaid"** (Emphasis added.) Claimant contends that medical mileage and the unauthorized medical allowance constitute disability compensation the same as temporary total **disability** compensation, permanent partial **disability** compensation, temporary partial **disability** compensation and permanent total **disability** compensation. The ALJ awarded both medical mileage and an unauthorized medical allowance, but did not include either in the penalties award. The Board agrees and affirms that decision. The language of K.S.A. 44-512b Furse 2000 fails to justify penalties for either medical mileage or the unauthorized medical allowance. Neither medical mileage nor the unauthorized medical allowance constitute disability under K.S.A. 44-512b Furse 2000. Where the language of a statute is plain and unambiguous, a court must give effect to its express language rather than determine what the law should or should not be. A court will not speculate on legislative intent and will not read the statute to add something not readily found in it.²

² *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered permanent partial disability on a functional basis for an injury to his left hand. The record does not support an impairment to the left wrist. Additionally, penalties for the unpaid medical mileage and unauthorized medical allowance are not proper under the statute.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 9, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge